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DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION ISSUE REPORT ON ANTITRUST AND INTELLECTUAL PROPERTY

Report Examines Issues Central to the Intellectual Property-Antitrust Interface and Discusses the Agencies' Antitrust Analysis of Conduct Involving Intellectual Property Rights

WASHINGTON — The Department of Justice (DOJ) and the Federal Trade Commission (FTC) today issued a joint report, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," to inform consumers, businesses, and intellectual property rights holders about the agencies' competition views with respect to a wide range of activities involving intellectual property.

The report discusses issues including: refusals to license patents, collaborative standard setting, patent pooling, intellectual property licensing, the tying and bundling of intellectual property rights, and methods of extending market power conferred by a patent beyond the patent's expiration.

"Intellectual property is a key driver of the U.S. economy and sound competition policy works to maintain a robust marketplace so that new products and services can flourish," said Thomas O. Barnett, Assistant Attorney General for the Department of Justice's Antitrust Division. "The Department of Justice is committed to ensuring that consumers benefit from both competitive markets and strong intellectual property rights protection and enforcement necessary to facilitate innovation."

The report follows a series of hearings jointly conducted by the agencies in 2002, entitled "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy." During 24 days of hearings spanning over 10 months, the agencies received submissions and heard testimony from more than 300 commentators who offered diverse perspectives and represented a wide range of interests, including those of the biotechnology, computer hardware and software, Internet, and pharmaceutical industries; independent inventors; and leading scholars and practitioners learned in antitrust law, intellectual property law, and economics.

"Our nation's antitrust and intellectual property laws share the goal of promoting innovation, which in turn greatly benefits our consumers," said FTC Chairman Deborah Platt Majoras. "The FTC takes seriously our responsibility to tackle the difficult issues that can arise when the antitrust laws are applied to IP, often in settings where business practices are rapidly

evolving. We endeavor to adopt policies that permit competition and innovation to thrive, and

this report explains our current policy thinking."

The agencies' analysis of intellectual property focuses on preserving both competition and incentives for creativity and innovation. The report indicates that the DOJ and FTC will analyze the vast majority of conduct involving intellectual property rights using a flexible rule of reason approach that considers both the efficiencies of a particular activity as well as any anticompetitive effects it may create. With the agencies' improved understanding of intellectual property, the agencies can better ensure that intellectual property and antitrust laws continue to achieve their common goals of "encouraging innovation, industry and competition," according to the report. The report's conclusions include the following:

- Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is in tension with the antitrust laws;

- Conditional refusals to license that cause competitive harm are subject to antitrust scrutiny;

- Joint negotiation of licensing terms by standard-setting organization participants before the standard is set can be procompetitive. Such negotiations are unlikely to constitute a *per se* antitrust violation. The agencies will usually apply a rule of reason analysis when evaluating these joint activities;

- The agencies evaluate the competitive effects of cross licenses and patent pools under the rule of reason framework articulated in the 1995 Antitrust-IP Guidelines;

- Combining complementary patents within a pool is generally procompetitive. A combination of complementary intellectual property rights, especially those that block the use of a particular technology or standard, can be an efficient and procompetitive way to disseminate those rights to would-be users of the technology or standard. Including substitute patents in a pool does not make the pool presumptively anticompetitive–competitive effects will be ascertained on a case-by-case basis;

- The agencies apply a rule of reason analysis to assess intellectual property licensing agreements, including non-assertion clauses, grantbacks, and reach-through royalty agreements;

- The Antitrust-IP Guidelines will continue to guide the agencies' analysis of intellectual property tying and bundling. The agencies consider both the anticompetitive effects and the efficiencies attributable to a tie, and would be

likely to challenge a tying arrangement if: (1) the seller has market power in the tying product, (2) the arrangement has an adverse effect on competition in the relevant market for the tied product, and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects. If a package license constitutes tying, the agencies will evaluate it under the same principles they use to analyze other tying arrangements;

- The agencies consider both the anticompetitive effects and the efficiencies attributable to a tie or bundle involving intellectual property;

- The starting point for evaluating practices that extend beyond a patent's expiration is an analysis of whether the patent in question confers market power. If so, these practices will be evaluated under the agencies' traditional rule of reason framework, unless the agencies find a particular practice to be a sham cover for naked price fixing or market allocation; and

- Collecting royalties beyond a patent's statutory term can be efficient. Although there are limitations on a patent owner's ability to collect royalties beyond a patent's statutory term, *see Brulotte v. Thys Co.*, 379 U.S. 29 (1964), that practice may permit licensees to pay lower royalty rates over a longer period of time which can reduce the deadweight loss associated with a patent monopoly and allow the patent holder to recover the full value of the patent, thereby preserving innovation incentives.

Copies of the report can be found on the Department of Justice's Web site at http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf. The Antitrust Guidelines for the Licensing of Intellectual Property can be found at http://www.usdoj.gov/atr/public/guidelines/0558.pdf. Transcripts and written submissions from the 2002 intellectual property hearings are available at http://www.usdoj.gov/atr/hearing.htm.

Contacts:
DOJ Press Office: Gina Talamona, 202-514-2007
DOJ Staff: Frances Marshall, 202-305-2520

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